

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

74-2676

To be argued by:
ARLENE R. SILVERMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel.
EUGENE FRANK IRONS,

Appellant, :

-against- :

Docket No. 74-2676

ERNEST L. MONTANYE, Superintendent, :
Attica Correctional Facility, :

Appellee. :

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BRIEF FOR APPELLEE

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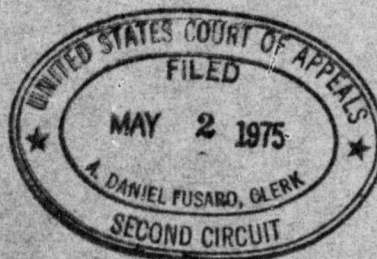


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BRIEF FOR APPELLEE

Question Presented

Did the District Court properly dismiss petitioner's application as repetitive where his claim of an invalid search warrant was previously ruled upon and rejected by the District Court, where the search of petitioner was incident to a lawful arrest, and where, even absent any search and seizure, petitioner had admitted his guilt to the arresting officer and his conviction was a certainty?

Statement

This is an appeal from an order of the United States District Court for the Western District of New York dated March

25, 1974, (Curtin, J.) which denied petitioner's application for a writ of habeas corpus. On December 19, 1974, this Court granted petitioner's application for a certificate of probable cause.

Facts

Background

Petitioner was convicted of Burglary Third Degree and Grand Larceny First Degree in the Onondaga County Court on April 6, 1966 following a jury trial. The indictment arose out of a burglary and larceny committed at the Fleischmann and Sons Wholesale Jewelry Company. Petitioner was apprehended on July 26, 1965 at the Greyhound Bus Station in Syracuse, New York. At the time of his arrest, petitioner admitted that he had broken into the Fleischmann Company on two occasions, July 16, 1965 and July 24, 1965.

Petitioner appealed his conviction to the Appellate Division, Fourth Department claiming that the Court's charge prejudiced his right to a fair trial and that the Court erred in finding his confession voluntary. Petitioner's conviction was affirmed by the Appellate Division on May 9, 1968. Leave to appeal to the New York Court of Appeals was denied on November 13, 1968.

Petitioner instituted an application for a federal writ of habeas corpus in the United States District Court for the Western District of New York by application dated December 30, 1968, claiming that a warrant authorizing his search was invalid since it issued on the basis of hearsay information and was not reasonably corroborated. The application was denied on July 3, 1969. This Court denied a certificate of probable cause on October 1, 1969.

By application dated June 8, 1972, petitioner instituted a second application in the same court attacking the validity of the search warrant on the grounds that it was not executed within ten days of the date of issuance and that it did not authorize a nighttime search. This application was denied on March 25, 1974.

The Hearing

Robert Francis Barrett testified he was a Sergeant in the Criminal Investigation of the Syracuse Police Department. In the early morning hours of July 26, 1965, he arrested the defendant, Eugene Frank Irons, in the Greyhound Bus Station at about 12:30 A.M. and transported him to the

Public Safety Building where Lieutenant Sardino interrogated Irons in his presence. The questioning started at 1 A.M. and finished about 1:30 A M (H 2-6).*

Barrett heard Lieutenant Sardino advise the defendant as to whether or not he wished to be represented by an attorney. He also heard the lieutenant advise him of his right to remain silent and he informed him that any confessions he made might be used against him at a subsequent trial (H 8-10).

Lieutenant Sardino testified that he saw the defendant at the Criminal Investigation Division office on July 26, 1965 at approximately one o'clock in the morning. Sergeant Keppesser, Sergeant Barrett and Investigator Krzykowski were also present. Prior to any statement by Irons, Lieutenant Sardino stated that he was not required to make any statement, that he could remain mute, that anything he told them could be used against him in a subsequent trial, that he had the free use of a telephone and a telephone directory to call any attorney of his choice (H 10-12).

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* Numbers in parentheses refer to pages of the Huntley Hearing. A copy is submitted herewith.

The Defendant was not touched physically; no promises were made to him; no threats of force were used upon him. The defendant told him he had broken into a place in downtown Syracuse. His statement was reduced to writing by Sergeant Keppesser (H 12-14).

George William Keppesser testified that he took a statement from defendant Irons on July 26, 1965. He told Irons that any statement he made might be used in evidence against him, that he would be making this statement without promise or hope of reward, and that he could have a lawyer before making the statement (H 21-24).

The defendant Eugene Frank Irons testified. He stated that he was arrested at the Greyhound Bus Station. He was grabbed as he took twenty dollars out of his pocket to give

to the clerk. He testified that police officers told the clerk to keep it and that they accused him of killing a cop in New York. He claimed he told the police that he would like to call a lawyer but that they refused him permission to do so. He stated he was not advised of his right to remain silent or to make a telephone call (29-36).

The County Court found the admissions voluntary beyond a reasonable doubt and not obtained in violation of defendant's constitutional rights.

The Trial

Duane Paul Metzger testified that he is a member of the Syracuse Police Department. On July 16, 1965 he investigated a burglary at 436 South Salina Street, Syracuse, New York, Fleischmann & Sons Wholesale Jewelry Company. He arrived at 7:00 A.M. and went to Room 301. A janitor at the building had reported the robbery to Mr. Fleischmann. Metzger observed that the glass portion of the front door had been broken and that glass had been splattered on the inside floor. Fleischmann told him that various articles of jewelry had been taken. Officer Metzger found that a window on the west side of the building, off the fire escape, had been broken and he determined that it was the point of entry. He found a pair of

eyeglasses near the fire escape that appeared to be safety glasses (T. 7-9). (People's Exhibit # 1)*

Arthur N. Fleischmann testified he was the owner of George Fleischmann and Sons Wholesale Jewelry Store. He closed at 4 P.M. on July 15, 1965. He was called at 12 or 12:30 A.M. of the next day and was informed of the break in. The cost value of the items missing was \$3,050.13. He said there was a second burglary of his store on July 25, 1965 and the value of the items missing after this burglary was \$1,110.94 (T. 16-37).

Kenneth Irving Gosbee testified he was the janitor at 436 South Salinas Street. He related how he discovered the two burglaries of the jewelry store on July 15, and July 25, 1965 (39-45).

Henry Stanley Krzykowski testified that he is an investigator with the Syracuse Police Department and that he investigated the burglary on the 25th at the Fleischmann Jewelry Store. He found a handle from a suitcase or sample case on the fire escape outside a window in the building at South Salinas Street. He found a sample case in Thornden Park the night after Irons was arrested. Irons had told him that he had thrown the sample case into some shrubs in Thornden Park (53-58).

* Numbers in parentheses preceded by the letter T refer to pages of the trial transcript. A copy is submitted herewith.

Irons was apprehended on July 26, 1965 at the Greyhound Bus Station. The police had been alerted that Irons might try to leave town by bus and he and Sergeant Barrett were detailed to check the bus depot. He had a search warrant with him. He saw Irons enter the depot carrying two handbags or small suitcases. Irons was asked to identify himself. Initially he gave a name other than his own. He was placed under arrest and taken to the Criminal Investigation Division office. They did not examine the suitcases at the depot but just looked inside (T. 59-61).

Krzykowski spoke to Irons at the depot. Irons admitted breaking into the Fleischmann Company on two occasions, July 15, 1965 and July 24, 1965 (T. 64-65).

Thomas J. Sardino testified. He reiterated the testimony he gave at the hearing. After giving Irons the appropriate warnings, he admitted the burglaries at the Fleischmann Jewelry Company. He told them that the first time, he got a 38 caliber revolver and a quantity of jewelry and necklace sets. He sold the jewelry and gun in New York City. He then went to Thornden Park and disposed of a large luggage bag (T. 69-72). The bag was retrieved at Thornden Park. Iron's statement was reduced to writing at the Division's office (T. 73).

George William Keppesser testified he was with the Syracuse Police Department. He took defendant's written statement. He heard Lieutenant Sardino read Irons his rights (T. 78).

The defense called Martin Irons, uncle of the defendant. He said he saw him on July 15, 1965, had supper with him and took him to the Greyhound Bus Terminal (T. 89). He said his nephew wears glasses (T. 92).

Irons took the stand; he stated he went back to New York on July 15, 1965. However, he stated that his uncle took him to the depot about 8:30 P.M. but admitted that his bus was not until 2 A.M. (T. 98). He admitted that he received a pair of glasses in Auburn, New York and that People's Exhibit #1 were his glasses (T. 103).

First Opinion of the District Court
(Burke, D.J.)

The District Court found that petitioner was arrested on July 26, 1965 by officers of the Syracuse Police Department at 12:28 A.M. at the Greyhound Bus Station in Syracuse. He was carrying two small suitcases. The officers had a search warrant which was exhibited to the petitioner. The police officers searched the suitcase and one was filled with

jewelry. Without objection, the fruits of the search were offered into evidence at trial. The court held that the search was valid as incident to a lawful arrest or authorized by a legal search warrant. The application was denied.

Second Opinion of the District Court
(Curtin, D. J.)

Judge Curtin referred petitioner's application to a Magistrate. The Magistrate noted that petitioner was attacking the validity of a search warrant as he had done in a prior federal application and that the exhibits submitted to the District Court in the second application were identical to those previously submitted. Judge Burke had found that the search was valid as incident to lawful arrest as well as authorized by a legal warrant. In view of that decision, the Magistrate recommended that the application be denied. Judge Curtin adopted the recommendation of the Magistrate.

ARGUMENT

PETITIONER'S CONVICTION WAS A CERTAINTY SINCE HE ADMITTED COMMITTING THE BURGLARIES AT THE FLEISCHMANN WHOLESALE JEWELRY COMPANY AND HIS CURRENT ATTACK ON THE VALIDITY OF THE SEARCH WARRANT IS WITHOUT MERIT AND IS, IN ANY EVENT, BESIDE THE POINT.

Petitioner was arrested at the Greyhound Bus Depot by members of the Syracuse Police Department on July 26, 1965. After being apprised of his rights and without duress or coercion, he admitted that he had broken into the Fleischmann Jewelry Store in Syracuse. His oral admissions to the police officers were subsequently reduced to writing. Both the oral and written admissions were received in evidence at petitioner's trial, his conviction was thus a certainty, and his current attack on the validity of the search warrant is quite beside the point since, even if successful, petitioner's conviction would remain unimpaired. Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967).

Passing to the search warant claim nonetheless, petitioner has failed to preserve such an attack for federal habeas corpus relief since petitioner did not object, prior to or at trial, to the introduction of the seized articles.* U.S. ex rel. Schaedel v. Follette, 447 F 2d 1297 (2d Cir.).

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* Although petitioner alleges in this Court that he raised a search and seizure claim on appeal in a pro se supplemental brief, his position here is not improved. The State Appellate Courts do not normally review a claim raised on appeal for the first time, and this would be particularly true here since without an objection in the trial court to the validity of the warrant, no record would be developed for appellate review. Moreover, insofar as petitioner claims that the warrant could not be executed during the nighttime, this is a matter of state law and does not raise a constitutional claim.

In any event, as Judge Burke held and as Judge Curtin agreed, the search was valid as incident to an unchallenged lawful arrest.* U.S. Ex rel. Walls v. Mancusi, 406 F 2d 505 (2d Cir. 1969), cert. den. 375 U.S. 958. Petitioner's second application, as was his first was properly denied by the District Court.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD
BE AFFIRMED

Dated: New York, New York
May 2, 1975

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* Although petitioner's brief in this Court speculates (p. 12) that there was no probable cause for the arrest, this claim has never been raised in the New York Courts nor was it presented to either Judge Burke or Judge Curtin and is improperly urged here in the first.

3 Copies received May 2, 1975

The People's Aid Society

Donna Lawrence

